

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KIYOSHI ALAN HIGASHI,

Appellant.

No. 41926-2-II

UNPUBLISHED OPINION

Worswick, C.J. — Kiyoshi Higashi appeals his convictions for first degree murder, first degree burglary, and two counts each of first degree robbery and second degree assault, claiming that the trial court violated his constitutional right to self-representation by denying his requests to proceed pro se during his jury trial. He also argues that substantial evidence does not support certain findings of fact. We disagree and affirm his convictions.

Facts

A. *The April 28, 2010 Crimes*

On April 28, 2010, Higashi and three others engaged in a ruse to gain entry into James and Charlene Sanders' home to rob them. Higashi and Amanda Knight claimed to be interested in buying a wedding ring for her mother that James Sanders had advertised on Craigslist. Once they were in the kitchen discussing the ring with the Sanders, Higashi pulled out a gun, forced the Sanders to the floor, zip tied them, and signaled Joshua Reese and Clabon Berniard to assist with the robbery. During the course of the robbery, the Sanders' two boys were forced down the stairs

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and to the floor. There they saw Charlene threatened at gun point and assaulted, they heard James Sanders get shot, and one boy was struck with a pistol when he tried to fight one of the men. After shooting James Sanders in a back room, they dragged him out to the kitchen, smashed his head into a door frame, and left him on the living room floor.

Higashi and his cohorts stole the advertised ring, took the Sanders' wedding rings, Charlene's wallet, the boy's Play Station, and a cell phone, and, in the process, ransacked the house. James Sanders died immediately from his wounds.

After a jury found Higashi guilty of all counts and found firearm enhancements and aggravating sentencing factors on all counts, the sentencing court imposed an aggregate exceptional sentence of 1,486 months' incarceration. Higashi appeals.

B. *Requests For Self-Representation*

After a suppression hearing on February 11, 2011, Higashi asked to address the trial court. Higashi explained that he had fundamental disagreements with his attorney about his representation and requested that the trial court appoint new counsel. He also told the trial court that he was prepared to represent himself if it would not appoint him a new attorney. The trial court postponed discussing the issue until the next hearing on February 17.

On February 17, defense counsel explained that he and Higashi had met with the Department of Assigned Counsel director and resolved the conflict. The trial court asked Higashi, "Are you asking to represent yourself in this matter?" 1 Report of Proceedings (RP) at 21. Higashi responded, "No." 1 RP at 21. The trial court then asked, "Are you comfortable proceeding with Mr. Jordan as your attorney?" 1 RP at 21. Higashi responded, "Yes, ma'am." 1

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RP at 21.

On March 7, after the State had rested its case-in-chief, defense counsel explained to the trial court that Higashi wanted to testify but that he, defense counsel, did not agree. He asked the court if he could ask an open-ended question that would allow Higashi to say what he wanted to say to the jury. Defense counsel also explained that because of this conundrum, Higashi wanted to proceed pro se.

Higashi then told the trial court that in addition to wanting to testify, there were witnesses he wanted to call. He told the trial court that defense counsel refused to ask questions on cross-examination that Higashi wanted asked. After the trial court refused to allow Higashi to call back the State's witnesses to ask them questions, Higashi offered to call others from the State's witness list that the State had not called. The trial court expressed its concern that Higashi's request would create unacceptable delay. Higashi responded that he needed only 10 minutes to prepare his list, that he would testify that afternoon to avoid delay, and he would call his witnesses to testify the following Monday. After extensive discussion with Higashi, the trial court denied his request to represent himself:

THE COURT: Well, because the request is untimely and would result in the necessity for a recess so you could call your witnesses to see if they are willing to come to court and that you do not have any knowledge about how the rules of evidence could result in the prosecutor being able to get into evidence items that can be used against you, then I am going to be denying your request to represent yourself at this time.

5 RP at 514.

The trial court documented Higashi's response in unchallenged finding of fact 12:

"During the colloquy with the defendant, the court noted the defendant was smiling and asked the

defendant if the situation was funny. The defendant stated it was funny in a way. The court denied the defendant's request to act *pro se* and he grinned and laughed out loud." CP at 113. Higashi then testified on his own behalf.

On March 8, 2011, after the State finished its closing argument, out of the jury's presence, Higashi told the court, "Your Honor, at this point I would like to say something. I would like to waive all right to counsel and proceed *pro se*." 5 RP at 605. The trial court responded, "Your request is denied." 5 RP at 605.

C. *Higashi's Attempts to Disrupt and Delay Trial*

Because the trial court based its refusal to grant Higashi's request to proceed *pro se* on its concern that this would delay and disrupt the trial, Higashi's earlier attempts to delay and disrupt the trial are relevant to our decision. The trial court documented these events in unchallenged finding of fact 17:

The defendant has previously engaged in disruptive courtroom behavior including failing to follow directions of the court security staff. During an earlier court appearance in this case, the defendant was physically removed from the court room after he refused to follow directions of the security staff; the defendant then used his body weight to try to knock a court officer off his feet. The defendant also engaged in kicking and hitting the officers who removed him. He threatened to spit on the officers. The event resulted in an officer being injured. The defendant recently made statements to the effect that he has "nothing to lose." He has historically and recently demonstrated that he does not follow directions while in custody. The defendant has demonstrated historically and recently verbally and physically aggressive behavior, including several fights while in custody. The defendant recently inflicted significant injury, a fractured jaw, on fellow inmate.

CP at 114. As a result, the trial court ordered security staff to attach a "bandit" to Higashi's calf during the trial.¹

¹ A "bandit" is a small electronic device that security staff can activate to debilitate a defendant by

Further, on March 3, 2011, Higashi refused to appear at trial. The trial court documented these events in unchallenged findings of fact 18 and 19:

18. The defendant delayed these proceedings again on March 3, 2011 when the court was notified by court security staff that the defendant refused to appear in court. Corrections Officer Tim Kavanaugh testified that he had been the security escort for the defendant throughout the trial and he believed he had a good rapport with the defendant. Officer Kavanaugh testified that the defendant was refusing to dress for or attend court and the defendant told Kavanaugh he would have to be physically forced to go to court. The defendant also told Officer Kavanaugh that if the defendant was forced to appear in court he would cause a mistrial.

19. The court found that the defendant had voluntarily absented himself from the proceedings and the State called witness James Matter to testify. Within minutes, the court security staff notified the court that when the defendant learned that court would proceed without him, he demanded to be present. The court recessed to allow the defendant time to shower, dress and prepare for court. The defendant's actions caused a delay of nearly half a day of court time.

CP at 114-15.

During the State's cross-examination of Higashi, he refused to identify who struck the Sanders child during the robbery. When the trial court ordered him to answer, Higashi responded, "It was Willie foo foo. . . . He bopped the rabbit over the head, you know what I'm saying, while they was running in the forest." 5 RP at 533. The trial court, in uncontested finding of fact 21, found: "The defendant's refusal to follow the court's order to answer a question further demonstrates his inability or unwillingness to follow instructions as to courtroom behavior. The defendant's refusal to follow this court's order and answer this question demonstrates contempt of this court." CP at 115.

electrical shock.

Discussion

A. *Challenged Findings of Fact and Conclusions of Law*

1. *Findings of Fact*

The trial court entered findings of fact and conclusions of law in support of its decisions denying Higashi's request to represent himself. Higashi challenges eight of the trial court's findings. These are:

7. The defendant began reading names from the State's witness list and the court determined that none of the named witnesses besides the defendant were present. The defendant had not issued subpoenas and he had not taken any steps to secure the witnesses' attendance. The defendant could not tell the court how he was going to contact witnesses, and he suggested he could telephone witnesses but had not done so.

....

9. The defendant's request to proceed *pro se* was somewhat equivocal as it was based primarily on his desire to testify as he wished and to answer the questions he wished to be asked. He [sic] desire to testify as he wished was accommodated by his attorney and this court.

10. The defendant's request to call witnesses, whose names he did not initially know and whose attendance he had not secured, would have caused significant delay and disrupted the orderly administration of justice. The jury had already been waiting approximately two hours.

....

15. The court denied the defendant's third request without further inquiry or comment, which would have caused further delay of the proceedings.

16. The defendant's repeated requests were designed to delay the proceedings or obstruct justice or perhaps cause an error that would result in a mistrial.

....

22. The defendant's repeated attempts to delay the proceedings, his repeated disruptive behavior both in and out of the courtroom, his demonstrated inability or unwillingness to follow instructions on courtroom behavior, his refusal to comply with a court order, cause the court [to] believe his third request to proceed *pro se* was designed for the purpose of delay or disruption.

22.^[2] Further, the court has significant concerns that the defendant would intentionally or recklessly engage in behavior so disruptive or so prejudicial that

² There are two findings numbered 22; Higashi assigns error to both.

the court would be required to declare a mistrial.

23. The defendant has made prior requests to represent himself and then changed his mind, indicating that his requests are equivocal.

CP at 112-15.

Higashi also challenges two of the trial court's conclusions of law. They are:

2. The defendant's second request to proceed *pro se* was not timely and it was equivocal. It was made well into the trial and the State had rested and based primarily on the defendant's desire to testify as he wished. The defendant did not appear to be serious in making his request as he grinned and laughed when the request was denied. Allowing the defendant to proceed *pro se* would have caused significant delay in these proceedings and disrupted the orderly administration of justice. The concerns about the orderly administration of justice outweighed the defendant's right to represent himself.

3. The defendant's third request to proceed *pro se* was not timely. The court finds the request was designed to obstruct, delay, or gain opportunity for causing a mistrial. The need for the orderly administration of justice outweighed the defendant's right to represent himself.

CP at 116.

We review challenged findings of fact to determine whether substantial evidence supports them and, if so, whether the findings of fact in turn support the conclusions of law. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). We treat unchallenged findings of fact as verities on appeal. *State v. Gentry*, 125 Wn.2d 570, 605, 888 P.2d 1105 (1995).

The record supports finding of fact 7 as it follows directly from the trial court's colloquy with Higashi on March 7, 2011. The trial court asked Higashi to list his witnesses. After each name, the trial court asked if that person was present. None were. When the trial court asked Higashi how much time he needed to contact these witnesses, he responded, "How am I going to contact these people? . . . I'm in jail, ma'am." 5 RP at 512. Higashi then said he would have someone else contact them but when the trial court asked who, Higashi said he did not know but

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that he would figure it out. Finally, Higashi said that he could call all the witnesses himself and tell them they need to come to court to testify. The trial court found that this would delay the trial.

The record supports finding of fact 9 as it reflects Higashi's statements to the trial court about his dissatisfaction with trial counsel:

I asked to go onto the stand, and he said he didn't have no questions for me. I presented him with certain questions that I would like to be asked. He denied that, saying those weren't questions he would be willing to ask. This open-ended thing sounds like a solution, but still there are aspects of my case that I don't agree with Mr. Jordan's decisions on and things that I would like to bring up, but he would not like to do it. The only way I can see that happening is if I proceeded pro se.

5 RP at 496. After the trial court denied Higashi's request to continue pro se, it allowed defense counsel to present Higashi as a witness and ask the open-ended question, "Is there anything you want to tell the jury today about this case, about the incident that happened at the Sanders' house?" 5 RP at 517. Higashi then gave his narrative explanation of what happened.

Sufficient evidence also supports finding of fact 10. The trial court, which was in the best position to determine how delays might affect the trial, noted that Higashi's request would require a recess and he would need to contact the witnesses before he could call them at trial. Further, the record contains evidence that the jury had already been waiting two hours that day, that Higashi was still making a witness list from those witnesses the prosecution did not call, and that he did not have a way to contact them.

The record supports finding of fact 15, regarding the court summarily denying Higashi's third request to proceed pro se. It is a verity on appeal that the trial court was convinced that Higashi had contempt for the court. Higashi had engaged in conduct both in court and out that

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demonstrated that he was willing to disrupt and delay the proceedings. He had made at least one prior request to represent himself that he withdrew. Sufficient evidence supports the finding that Higashi's late request to proceed pro se would have resulted in delay.

The record supports finding of fact 16 as it is based, at least in part, on Higashi's obstructive and assaultive behavior in the courtroom and in the jail, his inability to follow directions, his refusal to come to trial, and his declaration that he would cause a mistrial if forced to go to trial. That Higashi changed his mind when the trial court commenced trial in his absence further supports that Higashi's intentions were to further delay or disrupt his trial.

Hagashi argues that this finding of fact and both findings 22 are inconsistent with the trial court's statement. "This is, I believe, the eighth day of trial, and Mr. Higashi has been present every day during trial and has not been disruptive of any of the proceedings." 4A RP at 13. But this statement references Hagashi's behavior in the courtroom during his trial. It does not reflect the behavior outside of and before trial detailed in unchallenged findings of fact 17 to 19 that Higashi assaulted court security staff, fractured another inmate's jaw while in the jail, and delayed the trial by refusing to come to court.

The record supports both findings of fact numbered as 22 as it reflects this same pretrial behavior, which necessitated Higashi to wear a bandit while in the courtroom.

The record supports finding of fact 23 as it reflects Higashi's decision to withdraw his initial request to represent himself. It also reflects Higashi's changing reasons for wanting to represent himself and his uncertainty about which witnesses he wanted to call. Substantial evidence supports the trial court's findings of fact.

2. *Conclusions of Law*

The trial court's findings of fact support its conclusions of law. They support conclusion of law 2 in that Higashi made his second request to represent himself after the State had rested its case-in-chief. The findings show that Higashi was fully unprepared to call witnesses, to follow the rules of evidence, or to avoid the necessity of a recess. The findings also show that Higashi smiled and laughed when the trial court denied his second request to proceed pro se. Further, it was within the trial court's province to consider Higashi's prior disruptive behavior in reaching its conclusion that allowing Higashi to represent himself would disrupt the orderly administration of justice.

The findings of fact also support conclusion of law 3 in that Higashi made his third request to represent himself even later in the trial, after the State's closing argument and before defense counsel's final statement. In considering Higashi's third request, the trial court could take into account its reasons for denying Higashi's earlier requests. The findings support that allowing Higashi to present his own closing statement would have disrupted the orderly administration of justice. As the trial court's findings of fact support its conclusions of law, we next consider whether the conclusions were legally proper.

B. *Right of Self-Representation*

Criminal defendants have a constitutional right to waive the assistance of counsel and represent themselves at trial. *Faretta v. California*, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Barker*, 75 Wn. App. 236, 238, 881 P.2d 1051, 1053 (1994). An unjustified denial of this right requires a new trial. *State v. Madsen*, 168 Wn.2d 496, 503, 229

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P.3d 714 (2010); *State v. Breedlove*, 79 Wn. App. 101, 111, 900 P.2d 586 (1995). Yet a defendant's request must be both timely and unequivocal. *State v. Stenson*, 132 Wn.2d 668, 742, 940 P.2d 960 (1995). And if the request is both timely and unequivocal, the trial court must decide if it is voluntary, knowing, and intelligent. *Madsen*, 168 Wn.2d at 504.

If the defendant's request is untimely, even though unequivocal and voluntary, the decision is within the trial court's discretion. *Stenson*, 132 Wn.2d at 737. Differing rules apply depending when the defendant makes his request:

The cases which have considered the timeliness of a proper demand for self-representation have generally held: (a) if made well before the trial or hearing and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978).

Here, Higashi made his first request to proceed pro se after a preliminary hearing but when he returned to court on February 17, 2011, he withdrew his request and expressed his desire to continue with appointed counsel. As such, the trial court never ruled on Higashi's request, making it unreviewable on appeal.

Higashi made his second request to proceed pro se immediately after the State had rested its case-in-chief. And Higashi made his third request to proceed pro se after the State had made its closing argument. We apply the third *Fritz* rule and review Higashi's second and third requests to determine if the trial court abused its discretion in not allowing him to proceed pro se. *Madsen*, 168 Wn.2d at 504. A trial court abuses its discretion if its decision is manifestly

unreasonable, the record does not support its decision, or it applied an incorrect legal standard.

Madsen, 168 Wn.2d at 504.

Higashi argues that the record does not support the trial court's findings that his request was "somewhat equivocal," "would have caused significant delay and disrupted the orderly administration of justice," and "could result in the prosecutor being able to get into evidence items that can be used against" him. Appellant's Brief at 8 (quoting CP at 112-13 and 5 RP at 514). While we agree that the latter reason is not an appropriate basis for denying Higashi's request, the record and findings as we set out above sufficiently support the first two reasons. *See Madsen*, 168 Wn.2d at 505 (improper to base decision on possibility that self-representation may be detrimental to defendant's case).³

To reiterate, it is apparent from the record that the trial court's primary concerns were the delay that would ensue and the disruption that would occur if it were to grant Higashi's requests to represent himself. The trial court questioned Higashi about how long it was going to take to get his list of witnesses and contact them. Although Higashi offered to take the stand that afternoon and have the witnesses appear the following trial day, the trial court did not find Higashi credible on this point, and it found that granting Higashi's motion would delay the trial. In our view, the trial court judge was in a better position to know this from her many years as a

³ On the face of the appellate record, it appears that Higashi was adamant in his desire to proceed pro se because he fundamentally disagreed with his counsel's decisions on presenting and cross-examining witnesses. But it also appears that Higashi simply wanted the opportunity to testify on his own behalf and was frustrated with defense counsel's advice against him doing so. To this extent, the record supports that Higashi's request was "somewhat" equivocal. Nonetheless, even if Higashi's request was unequivocal, the record supports the trial court's findings that granting the request would delay and disrupt the trial.

trial court judge than was Higashi.

The trial court also considered how Higashi had tried to disrupt the orderly administration of justice in other ways. Higashi had disrupted court proceedings, demonstrated an unwillingness to follow the rules, and engaged in contemptuous behavior. Additionally, the trial court legitimately recognized that allowing Higashi to represent himself could allow him to intentionally or recklessly disrupt the trial and, possibly, require it to declare a mistrial. The record and the findings support the trial court's concerns. It did not abuse its discretion in denying Higashi's second request to proceed pro se.

Finally, that Higashi again requested to proceed pro se during closing arguments did not necessitate another hearing. The trial court had observed Higashi's own testimony, his prior refusal to attend trial and the delay that it had caused, his refusal to answer questions even after the court had ordered him to do so, and learned of his threat to create a mistrial. This supports the trial court's conclusion that Higashi's third request "was designed to obstruct, delay, or gain opportunity for causing a mistrial. The need for the orderly administration of justice outweighed the defendant's right to represent himself." CP at 116. See *United States v. Dunlap*, 577 F.2d 867, 868-69 (4th Cir. 1978) (finding no abuse of discretion in denying a motion to proceed pro se made just before the defense closing); see also, *United States v. Smith*, 780 F.2d 810, 811-12 (9th Cir. 1986) (motion to proceed pro se made halfway through trial was properly denied as being untimely). The trial court did not abuse its discretion in denying Higashi's request to proceed

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pro se as the record supports its findings, which in turn support its conclusions of law, under which it applied the correct legal principles.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Hunt, J.

Van Deren, J.